United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1220

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VINCENT ALOI, JOHN DIOGUARDI,
RALPH LOMBARDO and JOHN SAVINO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

REPLY BRIEF SUBMITTED IN
BEHALF OF APPELLANT DIOGUARDI

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Given the constraints of time between service of the Government's brief and the oral argument, only selected points in the Government's brief are responded to in this reply brief. The remaining points will be answered on the oral argument.

I. ANSWERING APPELLEE'S POINT II

1. The *Soldano* Charge and its Effect Upon the Lack of Objection to the Charge in this Case.

The Government seems to assert that appellant's failure to object to fundamental defects in

the charge cannot be noticed as plain error because defense counsel were all supplied with a copy of the same charge in a prior case (*U.S.A. v. Soldano*), told that the charge on the substantive counts would be essentially the same, had the *Soldano* charge for eleven days, and then sat back "in apparent satisfaction with the ... instructions, only to emerge indignantly on appeal." (Br. 56, 54-56)

This, quite simply is not what occurred below.

At an in-chambers conference covering a wide gamit of problems, the trial judge asked defense counsel whether they had seen the Government's requests to charge. (3655) They had not, since the requests had not as yet been given to them. (3655) The court stated "In general I agree with what they say is law ...," however he did not believe in conducting legal seminars, and would not tell the jury why a law was passed or define laws to them. (3655)* The court then stated:

*A copy of the Government's request is being handed to the Court on oral argument. In each of the requests on the substantive counts, the Government asked that the statute, forming the basis of the count, be read *in haec verba* to the jury, in addition to a statement that the relevant statute is violated if certain elements are proved. The Government also asked for an extensive charge on the purpose of the federal securities laws (#3(a) and (b)).

> "The Government is aware of what I did in *Soldano* on the substantive crimes and I will give you a copy and ask you to pass around my *Soldano* charge on the substantive crimes. *This is not to take exception what [sic] I have done in Soldano. It is to give you the gist of how I handled it* and if you have other thoughts how it ought to be handled, I would hear it. You are not stuck with what I did in *Soldano* and you are free to except to it.
>
> In brief, I take the responsibility to tell the jury what the facts they have to find in the felony counts, only the felony counts. I don't tell them why the law was passed or the terms of the law. I tell them if you find these facts, you are to find guilt. If you don't, he is not." (3655-56)

The Government noted that *Soldano* "was basically a manipulation" (3657), and the court responded:

> "The theory; I am not saying I am going to use the same charge. *It is just my approach that I am showing you.*" (3657)

Another topic of discussion then began, and in the midst of a debate on the existence of a certain tape of the *Joe Bald* conversation with *Hellerman* and F.B.I. Agent *Branna*, the trial court stated:

"Just pass this amongst yourselves. This is the *Soldano* charge." (3664)

Almost immediately thereafter, the bench conference ended. (3667)

In its brief, the Government, at one point, acknowledges that defense counsel were shown "a written prototype of [the trial court's] proposed approach" and states that the trial court had "highlighted the precise format" which we now claim is error. To a very limited extent, the Government is correct. There was advance notice given that the trial court would not instruct the jury "why the law was passed or the terms of the law" but would use the *Soldano* format wherein "I tell them if you find these facts, you are to find guilt. If you don't, he is not." (3655-56) To this extent, we can no longer urge the court to hold, under *Morris v. U.S.*, 156 F2d 525 (9th Cir., 1946) and related cases (Dioguardi's Br. p. 35), that failure to read the statutes involved or otherwise define them, in and of itself constitutes plain error. Accordingly, we withdraw the first full paragraph on page 35 of our brief.

However, in the words of Dr. Spielvogel,* "So [said the doctor]. Now vee may perhaps proceed to begin. Yes?"

The trial court plainly stated he was passing the *Soldano* charge amongst counsel "to give you the gist of how I handled it." (3655) This was not done for any other reason than to apprise counsel of his approach to charging on the substantive crimes *i.e.* that he would not give a seminar in the laws of the United States by telling the jury why laws were passed or by defining them abstractly, but would instead instruct that if they found certain facts, then guilt had been established. The court specifically stated, "This [the passing around of the charge] is not to take exception what [sic] I have done in *Soldano*" (3655) because, as the court later stated, "I am not saying I am going to use the same charge. It is just my approach that I am showing you." (3657)

What emerges from all of this is that

*Roth, *Portnoy's Complaint*, p. 274.

while the Government is correct in asserting that no objection can now be made to the *form* of the trial court's charge, the Government is incorrect in attempting to spread the perimeters of this waiver, amoeba-like, to encompass not only the *format* but the *content* of the charge as well.

The *Soldano* charge was given to defense counsel to peruse at the bench conference for format, not to take home and study for exceptions to the various elements of the substantive crimes.* Counsel were told they were not given the *Soldano* charge to take exception to "what I have done in *Soldano*", (3655) quite obviously because, as the Government observed, *Soldano* was "basically a manipulation" whereas this case involved an offering, and also because the trial court was "not saying I am going to use the same charge. It is just my approach that I am showing you." (3657)

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*In the affidavit submitted in support of appellants' motion to strike certain portions of the Government's brief, all trial counsel were questioned and stated that they do not recall receiving a copy of the *Soldano* charge. Mr. DiPaola's files do not contain a copy, although he kept every document he received during the trial.

No waiver of objection to the trial court's ultimate failure to define the essential elements of the crimes can be inferred from the fact that eleven days before the charge, trial counsel were asked to take a look at a charge in the general format the judge planned to use and did not object that the charge in this case was going to follow that format.

Another interesting aspect emerges from all of this. The Government's requests to charge on the substantive counts in this case each contained specific statements of the various elements of each substantive crime. The appellant Dioguardi filed written requests to charge registering objection to specific government requests, designated by number, and proposing alternative language.* No objections to any Government request defining the elements of any of the substantive crimes was made. This is not surprising since each Government request on each substantive crime meticulously set out each and

*Copies of these requests are being handed up to the court on oral argument.

every element.*

The point of this is that the trial court had before it, well in advance of its delivery of the charge, a comprehensive definition of each element of each of the substantive crimes as well as specific objections to and alternative requests to those portions of the Government's proposed charge which appellant Dioguardi found objectionable.** There was

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* For instance, in its request on Count 18, the Government stated:

> "The relevant statute is violated if the Government has proven the following elements beyond a reasonable doubt.
>
> First: That a defendant, co-conspirator, or other person, in connection with the offer or sale of a security, used an offering circular which was false and misleading in light of the circumstances then existing.
>
> Second: That the defendant under consideration by the jury, did so wilfully and knowingly or caused others to do so wilfully and knowingly."

As the record demonstrates (A. 101, 5495) and as we argue in our main brief, the court below merely charged the first of these two elements, totally omitting any instruction on the second element, the element of wilfullness. (App. Br. 36)

** Specifically to Government requests 2-9, 12-16, 34, 35, 38 and 40.

no need for appellant to draw requests on the substantive counts, because the Government's requests were full, fair and unobjectionable. Counsel had every reason to believe that since the trial court had stated, after it received the Government requests, that it agreed with the Government's position on the law, and since counsel had registered objections to those statements of law deemed objectionable, that the charge to be given would fully cover the various elements of the substantive crimes as set forth in the Government requests.

It is unfortunate that objections to the charge actually given were not made, however even the most skilled trial counsel are not letter perfect day in and day out. The inclusion of Rule 52(b) in the Federal Rules of Appellate Procedure undoubtedly was premised upon this fact of human fallibility -- that the best of us can be mistaken in the heat of trial -- and permits unobjected-to errors to be reviewed on appeal if the appellate court deems them fundamental. We grant that the plain error rule is not a replacement for the responsibilities of trial

counsel in the ordinary case (see cases cited, Government Br. 56-57). However, in no case where the appellate court determines that the court below failed to charge on essential elements of crime, has there been an affirmance because of a lack of objection.* We submit that the errors in the charge are so fundamental as to constitute plain error and that review and reversal must be had on the basis of Rule 52(b).

2. The Government's Position on the Substantive Counts at Trial in Contrast to the Government Position Now Taken on Appeal.

The Government now argues that the portions of the trial court's charge we have claimed to be fatally deficient, fully and fairly state each essential element of each crime. It was rather astonishing to read this in light of the contrary position which the Government, heretofore, took in its request to charge. The following are some

*In one case, where such error was not objected to a trial, or briefed on appeal, this court, *sua sponte*, felt compelled to reverse, *U.S. v. Houle*, 490 F.2d 167, 171-172 f.n. 10 (2nd Cir. 1973)

examples:

(a) The Government's request on Count 18 specifically stated t hat the second element which the jury had to find to convict was that the use of the false offering circular was "wilfully and knowingly." Now the Government states that no instruction on this element was necessary since the jury could have found the omission of certain facts was wilfully done *sua sponte*. (Br. 61-62)

(b) The Government had requested a charge on wilfullness on Count 18 (Request 24) in addition to a charge on wilfullness and intent in the conspiracy count. (Requests 8 and 14) Now the Government asserts that the charge on wilfullness in the conspiracy count alone is sufficient to cover Count 18 as well. (Br. 62)

(c) The Government now claims that there was no need to charge the jury on the wire fraud counts (Counts 9 and 10) that the call had to be "in execution of the scheme to defraud" rather than merely in furtherance of the unlawful objectives of the conspiracy. (Br. 66) This was not the position the Government took at trial in its Requests No. 26 and 27.

(d) The Government now asserts that no error was committed by the trial court's confusing the counts under the securities law (Counts 2-9, laid under 15 USC §77(q)) with the mail fraud counts. (Counts under 18USC §1341)(Br. 59-60, and f.n.) However, in its requests to charge on these counts, the Government made careful delineation between these two crimes and the different elements of proof required for each. (Requests 19-23 and 28-32)

Additionally, the Government had requested the very instructions which were not given on the terms "fraudulent" and "material" (Request 21: definition of fraudulent scheme and fraud), which it now claims there was no need for the trial court to define. (Br. p. 59, f.n.)

We believe that the trial court's charge was deficient in each respect cited in our brief and that our assessment of deficiency is further supported by the content of the Government's requests to charge.

(e) The Government's argument that

Pinkerton v. U.S., 328 US 640, obviates the need for charging that wilfullness is an Element of the Substantive Crime under 15 USC ¶¶ 77(s) and 77(x) is not supported by the authority cited nor by any authority.

The Government argues that the trial court's failure to charge wilfullness as an element of Count 18 was, at best, harmless error because the court had already instructed the jury with respect to "*appellant's* wilfullness on the conspiracy count..." (Br. 62, emphasis added) The Government then asserts that "*that* wilfullness may suffice to hold appellants criminally liable *for the acts of Nelson*",* because "The law is well established that a defendant may be criminally liable for acts *which he causes* to be done through a wholly innocent intermediary." (Br. 62, emphasis added)

We submit that this argument confuses two completely different legal principles. The first

*who was named as a co-defendant in the indictment, testified as a Government witness at trial and who had actually prepared the offering circular forming the basis for Count 18.

holds that one charged as an aider and abettor may be well liable for acts which he wilfully causes an innocent intermediary to perform. The fact that his "cat's paw" has no criminal intent is of no consequence. This is the basis for the *Bryan* (483 F2d 88) and *Barr* (295 F.Supp. 889) cases cited in the Government's brief at pp. 62-63.* Since this was not the basis upon which the court below submitted the case to the jury, it cannot be used to sustain the conviction on appeal. See *United States v. Hernandez*, 290 F.2d 86, 90 (2nd Cir. 1961); *Thomas v. United States*, 398 F.2d 531, 541 (5th Cir., 1967); *United States v. Holmes*, 452 F.2d 249, 257 n.5 (7th Cir., 1971); *United States v. Rossi*, 432 F.2d 879, 895 n. 26 (9th Cir., 1970).

This legal principle is quite different from the *Pinkerton* theory of vicarious guilt, which

*The *Weisscredit* (325 F.Supp. 1384) and *Lester* (363 F.2d 68) cases also cited at Br. 62-63, are an application of a similar principle of conspiracy law -- that one who lacks capacity to commit an offense may nonetheless be convicted of conspiring to cause commission of that offense by one having capacity. The law school example usually given is that while a woman lacks capacity to commit rape, she can still be convicted of conspiracy to commit that crime, just as she can be convicted of aiding and abetting.

makes a conspirator liable for crimes committed by other members of the conspiracy even though we did not personally participate in or have knowledge of them. (See Government Request to Charge No. 34)

The elements for a finding of guilt under *Pinkerton* were well expressed by the Government in its Request 34:* that the jury had to find beyond a reasonable doubt, first that the substantive offenses had been committed by a co-conspirator, and then that the offense was reasonably forseeable and the defendant a member of the conspiracy when it was committed.

The prime utility to the Government of *Pinkerton* is in cases like this where many defendants neither personally participate in the substantive crime nor have knowledge that the substantive crime has been committed.** Guilt of such a defendant is

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*Defense counsel objected to this request on the quixotic ground that no *Pinkerton* charge should be given at all, not on the basis that the charge misstated the *Pinkerton* elements. See Appellant Dioguardi's requests to charge.

**The only substantive crimes charged in which any defendants actually participated were (the calls in Counts 9 and 10) the wire fraud counts. None participated in the preparation or use of the false offering circular -- Count 18 -- and Dioguardi had no knowledge of any offering circular because Hellerman specifically told him that he would sell the stock by use of phony buy and sell orders to make purchasers believe they had a guaranteed profit. (See Dioguardi's Br. p. 9, f.n.)

predicated entirely on the fact that *some* member of the conspiracy has, in fact, committed a crime and that the defendant -- who did *not* participate and who had *no* knowledge -- ought be penalized for the other person's crime on the *sole* basis of his membership in the conspiracy.

Pinkerton does not hold that a defendant, who wilfully and intentionally joins a conspiracy can be convicted of substantive crimes that have *not* been committed by a co-conspirator because of the co-conspirator's lack of capacity, intent, wilfullness or the like.*

Nor does *Pinkerton*, or any other case relied on by the Government hold that if the court charges that the jury must find that a defendant wilfully joins a conspiracy, that this charge on the conspirator's intent does away the need for the court to charge that totally different acts of a different person

*Consider how illogical this would be within the facts of the Pinkerton case itself. There one brother was convicted of 6 substantive counts committed by another and of conspiracy. He was sentenced consecutively on the counts. How could such a result be justified if the defendant performing the alleged criminal acts were acquitted and the defendant who did not perform or have knowledge of the acts convicted and punished separately for them.

are not criminal unless that other person performs those acts wilfully.

In this case the court charged that the jury must find that appellant did not stumble into the conspiracy by mistake and that he had to have a guilty intent in order to be found guilty of conspiracy. But the court failed to charge that Nelson, who prepared the offering circular, had to have acted wilfully in so doing. For this court to hold that appellant's intent to join the conspiracy is an adequate substitute for Nelson's required wilfullness in connection with the offering circular, would be to stretch *Pinkerton* to unprecedented, unwarranted and absurd lengths.

(f) The Government's reliance upon *U.S. v. Umans* (368 F.2d 725) and *U.S. v. Capitol Meats* (166 F.2d 537) is not only not supported by the Record but is predicated upon a false statement of facts.

We argued in our main brief (pp. 38-39; see also p. 6) that the evidence of Nelson's wilfullness in connection with the offering circular was equivocal. Nelson testified he took on the

AYSL stock issue initially upon Gaifer's representation that "he had the issue, in effect, placed." (2704) He, therefore, got an underwriter only to do the back-office work, not the selling. (2704) Nelson testified that while the circular did not *specifically* state that TEC-EC was to receive a fee for its work, he had included the TEC-EC fee in a statement in the offering circular concerning the other expenses of the issue. (2706-07) When Nelson was introduced to Hellerman, he believed Hellerman was a business man with an investment group who was going to buy up the shares. (2779) Hellerman first gave him a list of purchasers (2781) and later told him that rather than having many small purchases, only a few large blocks would be bought. (2784)

Up until the date of the closing which took place long after Nelson prepared the offering circular, there is no evidence to show that Nelson believed the deal was phony or that the offering circular was fraudulent and false. The Government's statement (Br. 63) that Nelson's own testimony made his wilfullness apparent is just not supported by the record.

In addition to this, the Government's statement (Br. 63) that Nelson admitted his wilfullness under Count 18 by "his plea of guilty to substantive charges under Sections 77s and 77x" (the statutes involved in Count 18) is flatly false.

Nelson pled guilty to *Count 19* not Count 18. (2692):

> "[Mr. Schrieber]: Do you know which counts you pled guilty to?
>
> A Counts 1 and 19."

Count 19 charged that Nelson and others wilfully kept false records of

> "...the dates of transactions in AYSL stock, to wit, transactions that took place after July 7, 1970 were recorded on the ledgers of TDA, on the customer's accounts... [and] confirmations...as having taken place on or prior to July 7, 1970 when in truth and fact as the defendant...Nelson...then and there knew, the aforesaid transactions had taken place after July 7, 1970." (A. 36-37)

This count was laid under 15 USC ¶¶78q(a) and 78(ff)(A37); not, as the Government states, under 77s and 77x (Br. 36).

Nelson never admitted his guilt under

Count 18, either on the stand or by this plea of guilty. His testimony and plea both demonstrate that the only wilfull conduct which the Government could attribute to him was in connection with the back-dating of the confirmation slips -- not in connection with any false statements in the prospectus.

The Government's reliance on the *Umans* and *Capitol Meat cases* (Br. 63-64) for the proposition that failure to charge that Nelson's conduct was wilfull was only harmless error because Nelson admitted his wilfullness in his testimony and by his plea to the 77s violation is predicated on a misreading of the record and a complete false statement of facts, and it deserves no weight or credence.

II. COUNT 9, THE WIRE FRAUD COUNT

The Government's argument on Count 9, responding to Dioguardi's Point III merely states that the proof amply showed the all was in execution of the fraudulent scheme. (Br. 68) This statement is belied by the Government's characterization of the function of that call in its own statement of facts.

While the Government argues that by the time the phone call between Dioguardi and Buster Aloi "the fraudulent scheme to unload the stock was already firmly established" (Br. 68), its statement of facts proclaims that "during the telephone call, they related the substance of the *tentative agreement* to Buster Aloi...", and that the call was made because "no final agreement to perpetrate the crime was possible" without Buster's and Dioguardi's guarantee. (Br. 12, emphasis added) "In other words [the Government brief continues]...the Aloi group could not do business with the...the Dio group, without their superior's express authority..." (Br. 12)

Upon the Government's own statement of facts, the call was for the purpose of finalizing a tentative scheme and not in execution of a fully formed scheme to defraud and hence was not wire fraud.*

*The Peerman case (244 Fed. 1) is not authority to the contrary (cited Government Br. 69). In that case after the scheme had been formulated, letters were sent to co-defendants for the purpose of executing the scheme. We have never claimed that a call need be to a victim in order to execute the scheme.

CONCLUSION

FOR THE FOREGOING REASONS, AS WELL AS THE ARGUMENTS MADE ORALLY BEFORE THIS COURT AND IN APPELLANTS' PRINCIPLE BRIEFS, THE JUDGMENT APPEALED FROM MUST BE REVERSED.

Respectfully submitted,

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Attorney for Defendant-
Appellant John Dioguardi

JAY GOLDBERG
Of Counsel

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Reply Brief

IS HEREBY ADMITTED.

DATED:

Attorney for

STATE OF NEW YORK
COUNTY OF NEW YORK

JESSE MOORE being duly sworn deposes and says: On July 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on KRISTIN BOOTH GLEN the attorney for the ~~respondent~~ appellant by ~~leaving~~ mailing ~~three~~ two copies thereof at his office located at 30 East 42nd Street New York, N.Y. 10017

Jesse Moore

Sworn to before me this 1st day of July, 1974

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires Sept. 1, 1974

Lillian Weisberg

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Reply Brief

IS HEREBY ADMITTED.

DATED:

Theresa Stangel & Associates

Attorney for Amicus

L Berg Secretary

STATE OF NEW YORK
COUNTY OF NEW YORK

JESSE MOORE being duly sworn deposes and says: On July 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Joel A Brenner the attorney for the ~~respondent~~ appellant-Ralph Lombardi by ~~leaving~~ mailing ~~three~~ two copies thereof at his office located at 1507 Franklin Avenue Mineola, N.Y. 11501

Jesse Moore

Sworn to before me this 1st day of July, 1974

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
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Certificate filed in New York County
Commission Expires Sept. 1, 1974

Lillian Weisberg